IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
EASTERN DIVISION

BARBARA BRANDON — PLAINTIFF

v. — Civil Action No. 1:99cv200-D-A

BAPTIST MEMORIAL HOSPITAL-
GOLDEN TRIANGLE, INC., and
LEROY BROOKS, INDIVIDUALLY and
IN HIS OFFICIAL CAPACITY — DEFENDANTS

OPINION

Before the court is the motion of the Defendant, Baptist Memorial Hospital-Golden Triangle, Inc., for summary judgment. Upon due consideration, the court finds that the motion should be granted.

Factual Background[1]

Plaintiff, Barbara Brandon, filed the underlying Complaint against the Defendants Baptist Memorial Hospital-Golden Triangle, Inc. (BMH), and Leroy Brooks, alleging, *inter alia*, that she was unlawfully terminated from employment as a licensed practical nurse with BMH on the basis of race and gender discrimination. Plaintiff's Amended Complaint provides, at best, an ambiguous maze of allegations with no clear indication as to either the extent of her federal claims, or the manner in which she is pursuing her allegations. It is altogether unclear whether she is asserting a claim under 42 U.S.C. § 1981, § 1983, Title VII of the Civil Rights Act of 1964, or some combination of each. The court is, therefore, constrained to glean from the Amended Complaint and her Brief Opposing Defendant Baptist's Motion for Summary Judgment, the full scope of her contentions.

[1] In ruling on a motion for summary judgment, the court is not to make credibility determinations, weigh evidence, or draw from the facts legitimate inferences for the movant. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). Rather, the evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in her favor. Anderson, 477 U.S. at 255. The court's factual summary is so drafted.

Barbara Brandon began working for BMH in 1979.[2] Originally employed as a nurse's assistant, Brandon later ascended to the position of licensed practical nurse (LPN) where she remained until her termination on June 11, 1997.[3] The events leading to Brandon's dismissal center around her political aspirations, specifically her campaign for a seat on the Columbus City Council.

In early 1997, Brandon qualified as a candidate for a position on the Columbus City Council, Ward 5, for the May 6, 1997 election. Brandon, running in the Democratic primary, was opposed by the incumbent, Jackie Evans. At all times prior to the election, Brandon continued working for BMH as an LPN. On April 18, 1997, Brandon was approached by Tom Murphree, Assistant Administrator of Patient Care Services for BMH, and questioned whether she had engaged in campaign activities and/or vote solicitation while on duty at the hospital. Brandon denied the allegation.

The parties' respective factual summaries diverge at this juncture and the remaining events are substantially contested. To be sure, the bulk of Plaintiff's claims include allegations of a vast conspiracy between her political foe and her employer, which culminated in her termination from BMH.

Brandon contends that Jackie Evans, Tom Murphree, Stuart Mitchell, Administrator of BMH, and Defendant Leroy Brooks, a long-time political adversary of the Plaintiff, worked together to secure her discharge from BMH. Evans, who was working as an Administrative Assistant to Lowndes County Supervisor Brooks, purportedly contacted Stuart Mitchell about Brandon. According to Plaintiff, Brooks and Evans held a secret meeting with Mitchell to

---

[2] There appears some dispute as to when Brandon began employment with the Defendant. Although her Amended Complaint alleges that she began in 1979, her deposition testimony indicated that her initial employment was with Golden Triangle Regional Medical Center in 1981. Deposition of Barbara Brandon, pp. 42-44.

[3] Prior to March 1993, what is now BMH was operated as a community hospital owned by Lowndes County, Mississippi, under the name Golden Triangle Regional Medical Center. On March 1, 1993, Baptist Hospital began leasing the facility in question and formed Baptist Memorial Hospital-Golden Triangle, Inc., a non-profit corporation chartered under the laws of the State of Mississippi.

discuss Brandon's alleged voter solicitation at BMH. This meeting resulted in Murphree again asking Brandon if she had been campaigning on the job, which she further denied. Murphree later produced a copy of an absentee ballot application of BMH patient, Mary Lee, and asked Brandon whether her signature appeared on the ballot application as a witness. Brandon acknowledged her signature to Murphree and was thereafter suspended pending review of the matter. By letter dated June 11, 1997, Brandon was terminated from employment with BMH for soliciting votes from patients while on duty.[4]

Brandon contends that the patient, Mary Lee, overheard a conversation about the Plaintiff's political campaign and requested assistance in registering to vote. While off-duty, Brandon returned to the hospital and out of "extraordinary courtesy" provided Lee with a registration form and absentee ballot. Plaintiff's Memorandum Brief Opposing Defendant Baptist's Motion for Summary Judgment, p. 6. Brandon further alleges that BMH's policy prohibiting solicitation is muddled and confused, that she was not familiar with the contents of the Administrative Policy and Procedures Manual, that Murphree failed to provide a clear explanation of the reason for Brandon's termination, and that she was ultimately terminated for exercising her First Amendment right to freedom of speech. As noted above, however, Plaintiff's allegations focus on her theory that BMH was working in tandem with Leroy Brooks and Jackie Evans to undermine her political activities.

Discussion

A. *Summary Judgment Standard*

On a motion for summary judgment, the movant has the initial burden of showing the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 325, 106 S.

---

[4] The BMH Administrative Policy and Procedures Manual explicitly prohibits employees from soliciting from patients. Policy 518 of the Manual provides:

> Distribution and solicitation of any kind are not permitted on the hospital premises, either by hospital employees, or visitors. ... Violation of this policy may result in disciplinary action up to and including discharge.

Defendant's Motion for Summary Judgment, Ex. 9. Plaintiff's signature appears on a Receipt Slip dated May 11, 1993, acknowledging that she received a copy of the Manual and that she understood she was governed by its terms. Defendant's Motion for Summary Judgment, Ex. 7.

Ct. 2548, 2554, 91 L. Ed. 2d 265 (1986) ("The burden on the moving party may be discharged by 'showing'... that there is an absence of evidence to support the non-moving party's case."). Under Rule 56(e) of the Federal Rules of Civil Procedure, the burden shifts to the nonmovant to "go beyond the pleadings and by...affidavits, or by the depositions, answers to interrogatories, and admissions on file, designate specific facts showing that there is a genuine issue for trial." Celotex Corp., 477 U.S. at 324. That burden is not discharged by "mere allegations or denials." Fed. R. Civ. P. 56(e). All legitimate factual inferences must be made in favor of the nonmovant. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255, 106 S. Ct. 2505, 2513, 91 L. Ed. 2d 202 (1986). Rule 56(c) mandates the entry of summary judgment "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex Corp., 477 U.S. at 322. Before finding that no genuine issue for trial exists, the court must first be satisfied that no reasonable trier of fact could find for the nonmovant. Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 587, 106 S. Ct. 1348, 1356, 89 L. Ed. 2d 538 (1986).

B. *Claims Against BMH*

1. Title VII

To the extent Brandon is alleging a claim under Title VII, 42 U.S.C. § 2000e, those claims are jurisdictionally barred by her failure to file an administrative complaint with the Equal Employment Opportunity Commission. See Barnes v. Levitt, 118 F.3d 404, 408 (5th Cir. 1997)(filing administrative complaint is jurisdictional prerequisite to Title VII action); Dollis v. Rubin, 77 F.3d 777, 780 (5th Cir. 1995)(exhaustion of administrative remedies required prior to seeking judicial relief); Abeita v. TransAmerica Mailings, Inc., 159 F.3d 246, 254 (6th Cir. 1998)("Federal courts do not have subject matter jurisdiction to hear Title VII claims unless the claimant explicitly files the claim in an EEOC charge . . . ."). Accordingly, any claim asserted by Brandon pursuant to Title VII shall be dismissed for lack of subject matter jurisdiction.

2. 42 U.S.C. § 1981

Brandon alleges that BMH unlawfully terminated her employment on the basis of racial and gender discrimination. Given that her Title VII claims are barred, the court will assume she is pursuing her claims under 42 U.S.C. § 1981 which provides:

a) Statement of Equal Rights

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

In addition to the plain language of the statute, the Supreme Court has clearly established that claims for sexual discrimination are not within the scope of § 1981. See Runyon v. McCrary, 427 U.S. 160, 167, 96 S. Ct. 2586, 2593, 49 L. Ed. 2d 415 (1976)(Section 1981 in no way addresses claims for religious or sex discrimination, but is instead concerned with discrimination on the basis of race or color.). Thus, Brandon's claim of gender discrimination also fails and shall be dismissed.

The court will now turn to Plaintiff's claim of race discrimination. To establish a prima facie case of racial discrimination under § 1981, a plaintiff must prove:

> 1) that she is a member of a protected class;
>
> 2) that she was qualified for her position;
>
> 3) that despite her qualifications, she suffered an adverse employment decision; and
>
> 4) her employer replaced her with a person who is not a member of the protected class, or in cases where the employer does not intend to replace the plaintiff, the employer retains others in similar positions who are not members of the protected class.

Meinecke v. H & R Block Income Tax Sch., Inc., 66 F.3d 77, 83 (5th Cir.1995); Valdez v. San Antonio Chamber of Commerce, 974 F.2d 592, 596 (5th Cir.1992); Thornbrough v. Columbus & Greenville R.R. Co., 760 F.2d 633, 642 (5th Cir.1985) (citing Williams v. General Motors Corp., 656 F.2d 120, 129 (5th Cir.1981), cert. denied, 455 U.S. 943, 102 S. Ct. 1439, 71 L. Ed. 2d 655

(1982)).

A plaintiff may use either direct or circumstantial evidence to prove a case of intentional discrimination. United States Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 714 n. 3, 103 S. Ct. 1481 n. 3, 75 L. Ed. 2d 403 (1983). Because direct evidence is rare, a plaintiff ordinarily uses circumstantial evidence to meet the test set out in McDonnell Douglas Corp. v. Green: 1) The plaintiff must first demonstrate a *prima facie* case of discrimination; 2) if successful, the burden of production shifts to the defendant to produce a legitimate and nondiscriminatory basis for the adverse employment decision; and 3) finally, the plaintiff must show that the defendant's offered reason is pretext and that race discrimination was the substantial factor in the employment decision. McDonnell Douglas, 411 U.S. 792, 802, 93 S. Ct. 1817, 1824, 36 L. Ed. 2d 668 (1973); see Davis v. Chevron U.S.A., Inc., 14 F.3d 1082, 1087 (5th Cir.1994) (applying McDonnell Douglas test); Vaughn v. Edel, 918 F.2d 517, 521 (5th Cir.1990).

The first three elements of Plaintiff's case are clearly established. Brandon is a member of a protected group (she is African-American), there is no dispute as to her qualifications for her position, and there is no dispute that she was discharged after allegedly soliciting votes from BMH patients while on-duty. With regard to the fourth element, Brandon does not aver that she was replaced with person that is not a member of the protected class, rather she argues that no other employee has ever been disciplined by BMH for witnessing an application for an absentee voter ballot. As such, presumable non-members of the protected class received more favorable treatment.[5]

Assuming arguendo that Brandon is capable of establishing her prima facie case, the burden of production then shifts to the Defendant to articulate a legitimate, non-discriminatory reason for the adverse employment decision. See McDonnell Douglas Corp., 411 U.S. at 802. In

[5] The court presumes this point because Plaintiff makes no allegation that the other employees who purportedly engaged in more serious conduct than Brandon were non-members of the protected class.

this case, the Defendant contends that Brandon was terminated for invading the privacy rights of its patients by soliciting political support and/or votes while on-duty. Indeed, Plaintiff's signature does appear as a witness on the patient's "Official Application for Absent Elector's Ballot," and she admitted bringing the forms to the patient. The court finds the Defendant's reason sufficient to meet its burden in this regard.

The Plaintiff must now raise a genuine issue of material fact as to whether the reason proffered by the Defendants is pretext for discrimination and whether discrimination was at least a substantial motivating factor in her termination. The Fifth Circuit has made clear that a plaintiff may avoid summary judgment if the evidence, taken as a whole:

> 1) creates a fact issue as to whether each of the employer's stated reasons was not what actually motivated the employer and 2) creates a reasonable inference that race was a determinative factor in the actions of which plaintiff complains.

Grimes v. Texas Dept. of Mental Health and Mental Retardation, 102 F.3d 137, 141 (5th Cir. 1996). This Plaintiff fails to do. Brandon makes a blanket allegation that no other employee of BMH has been disciplined under the policy which formed the basis of her dismissal. She further states that her conduct did not violate the hospital policy and that other employees who had engaged in more serious, harmful conduct were subject to little or no discipline. Plaintiff, however, makes no assertion that non-members of the protected class received more favorable treatment, only that other employees were more favorably treated.

Further assuming, as Brandon contends, that no other BMH employee had been disciplined under the "no solicitation" policy and that other employees were less severely punished for various offenses, does not establish or even suggest that she was terminated for an unlawful discriminatory purpose. Although Plaintiff attempts to characterize BMH's basis for her discharge as pretext for discrimination, she wholly fails to offer credible evidence tending to establish a reasonable inference that discrimination was a determinative factor in her termination, that the Defendant's proffered reason for terminating her employment was a pretext for discrimination, or that BMH's use of its "no solicitation" policy exposed discrimination as a

substantial motivating factor in her termination. See Swanson v. Gen. Servs. Admin., 110 F.3d 1180, 1188 (5th Cir. 1997)(Once an employer offers a legitimate, non-discriminatory reason that explains both the adverse action and the timing, the plaintiff must offer some evidence from which the jury may infer that discrimination was the real motive.).

While Brandon appears to believe that BMH fired her because of her race, a plaintiff's subjective belief of discrimination is insufficient to warrant judicial relief. EEOC v. Louisiana Office of Community Servs., 47 F.3d 1438, 1448 (5th Cir. 1995); Grizzle v. Travelers Health Network, Inc., 14 F.3d 261, 268 (5th Cir. 1994)(employee's generalized testimony stating subjective belief that discrimination occurred insufficient to support jury verdict for plaintiff); Elliot v. Group Med. & Surgical Servs., 714 F.2d 556, 567 (5th Cir. 1983)(subjective belief of discrimination, however genuine, cannot be the basis of judicial relief).

The record in the instant case is notably lacking in evidence that the Plaintiff was discharged from employment at BMH on the basis of her race. Accordingly, the court is of the opinion that the Plaintiff has failed to establish that the Defendant's articulated reason for terminating Brandon was mere pretext or that the employment decision was based on race discrimination. There is no genuine issue of material fact with respect to this matter, and the Defendant is entitled to judgment as a matter of law on this claim.[6]

3. 42 U.S.C. § 1983

By its terms, 42 U.S.C. § 1983 requires that the person accused of injuring another be acting under state statute, ordinance, regulation, custom, or usage. Bullock v. Resolution Trust Corp., 918 F. Supp 1001, 1013 (S.D. Miss. 1995). Where, as here, a party predicates her § 1983 claim on the infringement of her rights to free speech and due process, that party must demonstrate that her First and Fourteenth Amendment loss stemmed from conduct properly or fairly attributable to the state. Frazier v. Board of Trustees of Northwest Miss. Reg'l Med. Ctr.,

[6] The court notes that had the Plaintiff's Title VII claim not been dismissed for failure to exhaust her administrative remedies, it would have been dismissed for the same reasons as the Plaintiff's claim under § 1981.

765 F.2d 1278, 1283 (5th Cir. 1985). Thus, in order to maintain a claim under § 1983, Brandon must be able to demonstrate a violation of her rights by conduct that may be characterized as "state action." See Lugar v. Edmonson Oil Co., 457 U.S. 922, 924, 102 S. Ct. 2744, 73 L. Ed. 2d 482 (1982).

It appears clear, that a private hospital may be subject to the restraints of the First and Fourteenth Amendments only if its activities are significantly affected or intertwined with state action. McCrory v. Rapides Regional Med. Ctr., 635 F. Supp. 975, 980 (W.D. La. 1986). To this end, Brandon argues, alternatively, that BMH either 1) is a governmental entity, 2) is so closely connected with a governmental entity that it is subject to constitutional requirements, and/or 3) acted in conspiracy with Leroy Brooks, a governmental entity, to violate Plaintiff's constitutional rights.

Brandon contends that BMH became a governmental entity by operating on public property, assuming statutorily authorized duties, capitalizing and operating on public funds, and by undertaking county government functions imposed by the Hill-Burton Act. To support her claim that BMH is closely connected to a governmental entity, Plaintiff contends that BMH was capitalized with public funds, that it formed a joint venture with Lowndes County to administer funds for the benefit of BMH, and that BMH provides indigent care pursuant to the Hill-Burton Act as an agent of the County. Finally, Brandon hypothesizes that BMH took adverse action against her in an effort to seek approval of, cooperate with, and appease Defendant Leroy Brooks, a member of the Lowndes County Board of Supervisors, because of the vast power he held over the hospital. Brandon's claims are not only wholly without merit, but also border on pure fantasy. She has offered nothing to support her wild accusations other than a lease agreement between BMH and Lowndes County which she claims reflects the fact that the hospital is owned by the County.

In this case, the actions complained of were taken by a hospital which is privately owned and operated, but which in many financial particulars of its business is subject to federal and state

regulation. The mere fact that a business is subject to federal or state regulation does not by itself convert its action into that of the State of Mississippi for purposes of the First or Fourteenth Amendments. See Jackson v. Metropolitan Edison Co., 419 U.S. 345, 350, 95 S. Ct. 449, 453, 42 L. Ed. 2d 477 (1984). Similarly, the mere fact that a hospital receives some or substantial local financial support is not sufficient to subject the acts of that business to the restraints of the First and Fourteenth Amendments. See Bass v. Parkwood Hosp., 180 F.3d 234, 242 (5th Cir. 1999)(private hospital not transformed into state actor merely by statutory regulation); Wheat v. Mass, 994 F.2d 273, 275-76 (5th Cir. 1993)(hospital not state actor solely because of federal funding and state regulation); Daigle v. Opelousas Health Care, Inc., 774 F.2d 1344, 1348-49 (5th Cir. 1985)(1983 claim not cognizable against private nursing home despite state regulation and public funding).

> The test of whether a hospital is involved in state action depends on whether a symbiotic relationship between the hospital and the state exists – that is, whether there exists a sufficiently close nexus between the state and hospital so that the state plays some meaningful role in the mechanism leading to the disputed act.

McCrory, 635 F. Supp. at 980(citing Frazier, 765 F.2d at 1288; Madry v. Sorel, 558 F.2d 303, 305 (5th Cir. 1977)).

Here, it appears clear that all decisions concerning the operation of BMH, including employment decisions, are made exclusively by the hospital management or its Board of Directors and are free of government involvement. The court is of the opinion that this case "amounts to no more than a private employer's internal decision over the composition of its staff," and cannot support a claim of constitutional magnitude. See Frazier, 765 F.2d at 1284.

Upon analyzing the facts presented, the court finds that the Plaintiff has shown no genuine issue of material fact regarding whether the actions of the Defendant are fairly attributable to the state. Thus, the Plaintiff's claims under § 1983 fail. Furthermore, even if the Defendant was a state actor, the Plaintiff has failed to show that the Defendant violated any of her constitutional rights. Accordingly, the court concludes that summary judgment is proper.

Having dismissed the claims over which it has original jurisdiction, the court declines to exercise supplemental jurisdiction over the Plaintiff's state law claims against this Defendant. See 28 U.S.C. § 1367. Therefore, the court shall dismiss the Plaintiff's state law claims without prejudice.

C. *Defendant's Motion to Strike*

Also pending before the court is the Defendant's motion to strike Plaintiff's affidavit filed in support of her response to the motion for summary judgment. The Defendant argues, *inter alia*, that the affidavit includes statements that contradict prior sworn testimony and that are not supported by personal knowledge. In considering the Defendant's motion for summary judgment, the court did not base its ruling on the affidavit submitted by the Plaintiff. Therefore, the motion to strike is moot and shall be denied as such.

A separate order in accordance with this opinion shall issue this day.

This the ____ day of May 2000.

_____
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
EASTERN DIVISION

BARBARA BRANDON — PLAINTIFF

v. — Civil Action No. 1:99cv200-D-A

BAPTIST MEMORIAL HOSPITAL-
GOLDEN TRIANGLE, INC., and
LEROY BROOKS, INDIVIDUALLY and
IN HIS OFFICIAL CAPACITY — DEFENDANTS

ORDER

Pursuant to an opinion issued this day, it is hereby ORDERED that:

1) the Defendant, Baptist Memorial Hospital-Golden Triangle, Inc.'s motion for summary judgment is GRANTED;

2) Plaintiff's federal claims against Baptist Memorial Hospital-Golden Triangle, Inc., are DISMISSED WITH PREJUDICE;

3) Plaintiff's state law claims against Baptist Memorial Hospital-Golden Triangle, Inc., are DISMISSED WITHOUT PREJUDICE; and

4) Defendant's motion to strike is DENIED as moot.

SO ORDERED, this the _____ day of May 2000.

_____
United States District Judge